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No. 641

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

AUTOMATION DEVICES, INC.,

Petitioner,

vs.

EDWARD A. SMALENBERGER, JR., individually and doing business as AUTOMATIC FEEDER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on May 27, 1965, which was denied a rehearing on July 7, 1965.

OPINIONS BELOW.

The District Court's first oral opinion denied respondents' motion for summary judgment and dismissal and appears at pages 100-103 of Petitioners Appendix in the Court of Appeals.*

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* Record Citations are:

PA—Petitioners Appendix in the United States Court of Appeals for the Seventh Circuit.

RA—Respondents Appendix in the United States Court of Appeals for the Seventh Circuit.

The District Court's second oral opinion, which became the findings and conclusions, upon which Summary Judgment and dismissal were based is printed in the Petitioner's Appendix (PA 136-142). The Seventh Circuit Court of Appeals decision is reported at 346 F2d 288 and printed in the Appendix to this petition, along with the order denying rehearing. Also printed in the Appendix are the decisions of the Illinois Supreme Court in *Schulenberg* v. *Signatrol* which are unreported, but figure importantly in this petition.

JURISDICTION.

This Court's jurisdiction is based upon 28 U.S.C. 1254(1).

This petition is presented within ninety days from July 7, 1965, the date of the Court of Appeals decision denying rehearing of its original decision of May 27, 1965.

QUESTION PRESENTED.

Are State Laws, and particularly the decisions of the Illinois Supreme Court, which recognize the property in trade secrets and prohibit the appropriation of such trade secrets to copy unpatented products now unenforceable in view of the federal supremacy of the patent laws, as defined in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234, which permit the copying of unpatented products?

STATEMENT.

Petitioner sued respondent, its former exclusive representative in Chicago, for the violation of a contract of March 14, 1959, resulting from the termination of their business relationship. The complaint was filed on June 5, 1961. Unfair competition was pleaded based upon

respondents' making of "Chinese" copies of petitioner's products, selling the same to the same customers, and using the same labels as previously used on petitioner's identical products. Jurisdiction was predicated on the diversity of citizenship between the parties. 28 USC 1332(a)(1).

The general charge of unfair competition was also based on the stipulated fact that respondent used petitioner's ex-employee in making the "Chinese" copies of automatic vibratory feeding equipment reading:

> "28. The Defendant, in June, 1957, employed one Charles Angerer, who for the six preceding years had been an employee of the Plaintiff in its plant in Erie, Pennsylvania. Mr. Angerer had devoted the bulk of his time while employed by the Plaintiff in the modification of the stock vibratory feeders and bowls for specific feeding problems. Until September, 1958, Mr. Angerer was engaged by the Defendant in adapting feeders from the stock consigned to the Defendant by Plaintiff, at Defendant's place of business in Rock Falls, Illinois, operated under the name of Eas-E-Way Products Company. In September of 1958, Mr. Angerer assisted in the preparation of patterns, tools, jigs, and fixtures for the vibratory small parts feeders to be manufactured and sold by Defendant." (PA. 113-114) (Emphasis supplied throughout this petition unless otherwise indicated)

In further support of the charge of appropriating trade secrets, the ex-employee's testimony explains:

> "Q. Yes. Now are those blank bowls all alike, no matter whether they are on a Syntron or a Perry or an Afco or some other make feeder?

"A. When you say they are all alike, yes and no. Some feeders you can take one bowl and put it on a Type A feeder, but it will not operate functionally on a Type B feeder because of the weight involved or the unit isn't powerful enough to operate. So you have to have a different unit under different types of bowls." (RA 59)

In addition he testified that while working for petitioner he worked at waxing petitioner's patterns (R.A. 62), employed different materials for different purposes (R.A. 63), and had particularly used Devcon plastic in building patterns (R.A. 64). He summarized by stating he used the same techniques when employed by respondent to copy petitioner's products saying:

"Q. And that was what you did for Smalenberger, too, was it not?
"A. Yes, that is right." (R.A. 64-65)

A motion for summary judgment and dismissal was denied on May 7, 1963, the District Court commenting:

"In the first place, I think this is a case in which the principal parties should appear before the Court and testify. I do not think it should be tried on depositions nor on affidavits." (P.A. 101)

Thereafter this Court rendered its decisions in *Sears* and *Compco*. The District Court was again moved to dismiss the case and did so, on June 23, 1964. (P.A. 133)

The original appeal and petition for rehearing urged that a material issue of fact had been raised, and that petitioner was entitled to a trial on the issue of trade secrecy. The Court of Appeals held, as to the trade secret issue:

"We have carefully considered all of plaintiff's arguments, but believe it unnecessary to comment on each in detail. We find them lacking in merit.",

and on rehearing based solely on the trade secret issue held:

> "IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby DENIED."

The District Court, and the Court of Appeals in affirming the decision of the District Court, both refused to comment at all on the trade secret issue, or the controlling Illinois law in *Schulenburg* v. *Signatrol* (this appendix). Both Courts relied exclusively on the decisions of this Court in *Sears* and *Compco*.

No trial was had.

REASONS FOR GRANTING THE WRIT.

1. The failure of the Seventh Circuit to recognize that *Sears* and *Compco* did not sanction copying unpatented products by employing trade secrets, or other illegal means, could affect the laws of 50 states.

The best evidence of the recognition of a right in a trade secret is contained in the Restatement of Torts, Section 757:

> "*Definition of a trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.
>
> • • •
>
> "*Secrecy.* The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret."

The State and Federal Courts have followed the Restatement proposition; a few recent holdings are exemplary:

> *Sarkes Tarzian, Inc.* v. *Audio Devices, Inc., et al.*, 283 F2d 695 affg. 166 F Supp. 250 (CA 9, 1960); *The B. F. Goodrich Company* v. *Wohlgemuth*, 192 NE 2d 99 (Ohio Ct. affg., 1963); *E. I. duPont de Nemours & Co.* v. *American Potash & Chemical Corp.*, 200 A 2d 428 (Del. Chan. Ct. New Castle Cty, 1964); *Servo Corp. of America* v. *General Electric Co.*, 337 F2d 716 (CA 4, 1964); *Sperry Rand Corporation* v. *Rothbein et al.*, (DC Conn, 1964) 143 USPQ 172; *Colgate Palmolive Company, et al.* v. *Carter Products, Inc. et al.*, 230 F2d 855 affg. 130 F Supp. 557 (CA 4, 1956).

It is noteworthy that the Illinois Supreme Court has, in *Schulenburg,* distinguished *Sears* and *Compco.* There the Court pointed out that even though the finished product was unpatented, and could be copied by legal means, one could not take advantage of a confidential relationship and pirate another's trade secrets without responding in damages. Other Courts of Appeals have also distinguished *Sears* and *Compco* on similar facts: See *Servo Corporation of America* v. *General Electric Co.,* 337 F2d 716 (CA 4, 1964). The Court of Appeals for the Seventh Circuit, however, has refused to accept the distinction, by refusing to face the issue.

Trade secrets, know-how, blueprints, special tooling techniques, hardening procedures, mold, tool, die, and jig constructions and a whole host of formulae are valuable property, vital in present day production. To deny a property right therein without investigating the facts as here, threatens the entire business community with uncertainty as to its heretofore presumed rights in know-how and trade secrets. Indeed, the sweeping nature of the interpretation of *Sears* and *Compco* by the District Court in this very case raises the question of whether a covenant not to compete can be escaped by making "Chinese" copies when the Court held:

> "The court has very carefully studied the *Sears* and *Compco* cases cited above and concludes that where an item is unprotected by a patent or copyright it is against Federal policy to accord the item any other kind of protection, be it State Statute, proscribed by those cases, or contract of parties." (P.A. 138)

Only this Court can detail the rules regarding trade secrets and other acts which survive *Sears* and *Compco.* Failure to do so will surely witness a further compounding of the confusion witnessed in this case.

2. This Court's last basic ruling on the issue of trade secrecy was in 1917, followed by almost a half century of exploding technology. In *E. I. duPont de Nemours Powder Company* v. *Masland*, 244 U.S. 100, Mr. Justice Holmes pointed out:

> "Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them."

Is this still the law today? Must the relationship spring from contract? If so must the contract be written or oral? May the wrong be excused if the secret is not the subject of a patent application? Is it more important that a man be free to use his skills, even though acquired in confidence than it is to protect his teacher who in return for the protection of the secret, upgrades the skills of his employees?

This case is an ideal vehicle for this Court to announce the guideposts for the business community as to the above questions, since it has not been tried. Nevertheless, the stipulation of fact implies a relationship of trust, a learning of special techniques and know-how, and certainly the opportunity to employ the same for respondent in making copies of petitioner's unpatented products. In reviewing this case, therefore, this Court is not restricted by the particular facts in a case which had been tried. It may be free to define the law, as best fits today's technology for the ultimate public good to be realized from the protection of trade secrets.

3. The decision of the Court of Appeals in ignoring the issue of trade secrecy for which a trial is sought overlooks the Illinois law which it must follow pursuant to *Erie Ry.* v. *Tomkins,* 304 U.S. 64, (1938). It furthermore fails to consider this Court's dictates in *Conoly* v. *Gibson,* 355 U.S. 41 where it was held that a case may be dismissed only ". . . if it appears without a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In *Sears* this Court commented in footnote 2:

> ". . . The Court of Appeals by holding that because Illinois forbids misleading use of trade names it also forbids as unfair competition the mere copying of an article of trade without any palming off, thus appears to have extended greatly the scope of the Illinois law of unfair competition beyond the limits indicated in the Illinois cases and beyond any previous decisions of the Seventh Circuit itself. Because of our disposition of these cases we need not decide whether it was correct in doing so."

As will be noted from the appendix, the very converse appears in this case. Now the Supreme Court of Illinois has exhaustively reviewed the law of ex-employee relationship to the doctrine of trade secrecy. Now the Court of Appeals refuses to follow the controlling Illinois law.

It is noteworthy the Supreme Court of the State of Illinois reversed itself between January 19, 1965 and September 28, 1965. Obviously the interpretation of *Sears* and *Compco* was the fulcrum which pivoted the reversal. This proves the effect which *Sears* and *Compco* have had and will continue to have, unless this Court specifies in greater detail the illegal acts in copying unpatented products which remain actionable.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14832
AUTOMATION DEVICES, INC.,
Plaintiff-Appellant,
v.
EDWARD A. SMALENBERGER, JR.,
individually and doing business
as AUTOMATIC FEEDER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 26, 1965.

Before HASTINGS, *Chief Judge,* and KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* This was an action for breach of contract and unfair competition.

Plaintiff and defendant had settled their differences by a mutual release agreement designed to settle and discharge all obligations between them.

Plaintiff brought this action to recover damages caused by defendant's alleged violations of that agreement.

In the agreement, defendant, who had been plaintiff's exclusive sales representative, agreed not to represent to any customer or prospective customer that he was plaintiff's agent or plaintiff's authorized representative. He

agreed further to refrain from conduct which would reasonably lead such a customer or prospective customer to believe that the devices sold by defendant were manufactured or produced by plaintiff unless they were in fact so manufactured or produced.

There was extensive discovery and numerous pre-trial conferences. Most of the pertinent facts were stipulated. There was a comprehensive pre-trial order.

Shortly after the action of the United States Supreme Court in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 1964, 376 U.S. 225, reversing *Stiffel Co.* v. *Sears, Roebuck & Co.*, 7 Cir., 1963, 313 F. 2d 115, and *Compo Corp.* v. *Day-Brite Lighting*, 1964, 376 U.S. 234, reversing *Day-Brite Lighting, Inc.* v. *Compco Corp.*, 7 Cir., 1962, 311 F. 2d 26, defendant renewed his motion for summary judgment and dismissal which had been denied in May, 1963. In the cases cited above, the U.S. Supreme Court in effect ruled that a state statute could not render manufacture of a "Chinese" copy of an article unfair competition when that article was unprotected by patent or trademark. The District Court allowed the motion. The plaintiff's complaint was dismissed and this appeal followed.

It is plaintiff's view that defendant has admitted a breach of the contract in his description of his manner of operating his business; that defendant has made "Chinese" copies of plaintiff's products on which defendant has continued to use a label deceptively similar to the label used by plaintiff and similar to the label used by the defendant on plaintiff's products prior to the settlement agreement; and that defendant has advertised in the telephone "Red Book," trade literature and catalogs that he still handles plaintiff's products.

There is no issue of patent infringement.

The devices involved here are vibratory feeders whereby parts such as washers or bolts are conveyed by vibratory impulses imparted to a hopper bowl by a power unit. Auxiliary equipment and operating controls are fre-

quently made a component part of the basic power unit and housing assembly by some manufacturers such as Syntron Company of Homer City, Pennsylvania, as well as by defendant.

Both plaintiff and defendant are now licensees of Syntron Company, which was the originator of the vibratory feeders made by the plaintiff and defendant. Syntron was making and selling these devices in 1946. Plaintiff was organized in 1956 to acquire and continue the business of Perry Equipment & Engineering Co. The Vibratory Feeder Co. and Peeco (Perry Equipment & Engineering Co.) were designated as divisions of plaintiff. The parties stipulated that:

> The VFC Division sells standard "off-the-shelf" parts from a catalog. The Peeco Division "purchases" such parts from the VFC Division, and modifies the same for sale to the customer as a completed job for vibratory feeding.

It was further stipulated that:

> In 1948, the Perry partnership was a sales firm selling industrial equipment manufactured by others, including the sale of vibratory parts feeders manufactured by the Syntron Company of Homer City, Pennsylvania. Until sometime in August of 1955, the Perry partnership continued to purchase vibratory parts feeders components from Syntron. The parts feeders components so purchased from Syntron included both drive units and the housing or covers therefor as an integral unit. Thereafter, the Vibratory Feeder Company (VFC) was organized to manufacture vibratory feeder components, including drive units, housing or shells, blank bowl designs, and associated items which were purchased from it by the Perry Company. Some deliveries of such components were made by Syntron during the succeeding six months to plaintiff or its predecessor.

The resemblance between the devices made by plaintiff and defendant is not surprising as both are copied from Syntron's devices. Several of Syntron's patents have now expired.

Defendant's unit was first made and sold by defendant prior to March 14, 1959, the date of the release agreement with which we are concerned.

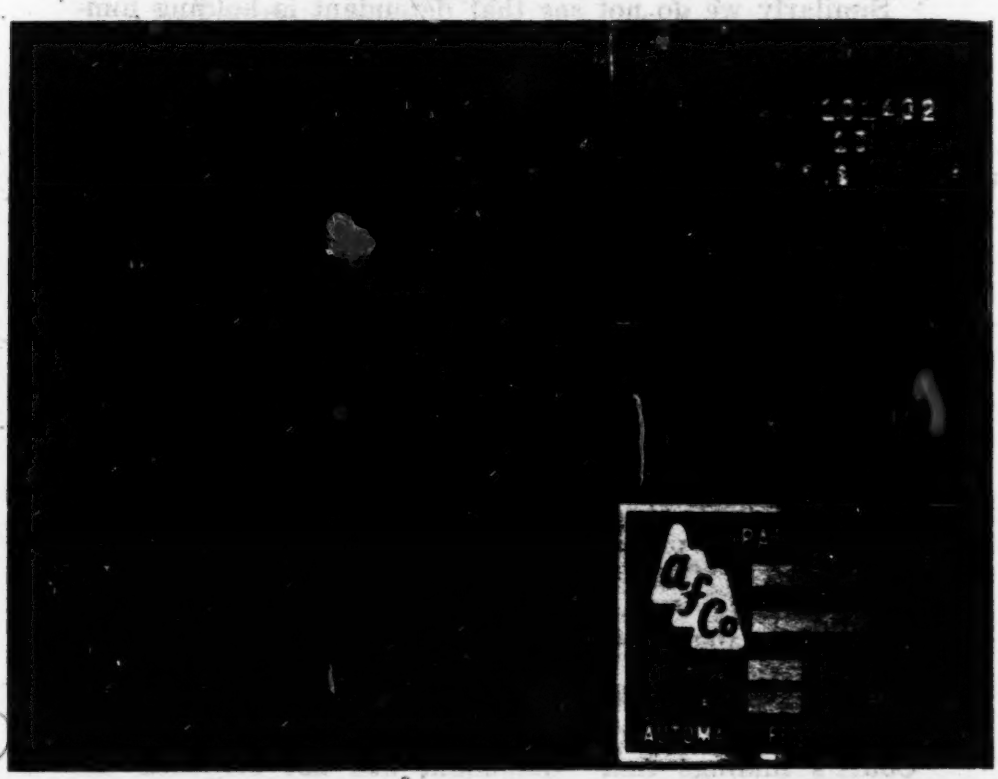
While defendant was plaintiff's representative, defendant stocked an inventory of consigned equipment from plaintiff. Defendant sold some items to defendant's own Eas-E-Way Products Co. which took the standard vibratory small parts feeders and tooled them specifically for specific customers' needs. The Eas-E-Way Co. became a licensee of plaintiff and was encouraged to brand-name plaintiff's products under its own name.

It was plaintiff's policy to encourage purchasers to name brand the products purchased from plaintiff so that the products appeared to have been manufactured by the purchasers. A letter dated November 15, 1955, from Perry Equipment & Engineering Co. to all its representatives said of prospective purchasers that "it will be with our blessing that he name brand any and all units that he purchases from us" permitting such purchaser "to become in a small sense a competitor * * * thereby hoping to obtain a greater dollar volume."

Although plaintiff stipulated that there are no trademark regulations involved, plaintiff argues that it has a property right in the Syntron originated devices by virtue evidently of its release agreement with defendant.

Much has been made of the misleading similarity of the name plates. Plaintiff's Exhibit 15 shows them as follows:

PLAINTIFF'S EXHIBIT 15



Plaintiff's plate is green and defendant's blue. The defendant's use of his plate was well known to plaintiff prior to the execution of the release agreement of March 14, 1959.

We do not find persuasive plaintiff's arguments to the effect that defendant's continued use of his own name plate on his own devices constitutes a breach of his agreement because he previously used the same plate on plaintiff's devices with plaintiff's approval.

Similarly we do not see that defendant is holding himself out as an authorized representative of plaintiff's when defendant offers for sale "rebuilt VFC-Peeco," "VFC" and "Peeco" feeders. There was evidence that plaintiff itself had sold units to defendant after the date of the agreement without limitations on use.

We disagree with plaintiff that the District Court erred in refusing to allow a tardy motion to amend the complaint by insertion of new issues based on facts which plaintiff knew or should have known long before, after what the District Judge described as "extremely involved and seemingly interminable proceedings • • • culminating in a stipulation of facts, pre-trial order and the respective statements by plaintiff and defendant of the issues of law and fact, preparatory for trial." We find no abuse of the Court's discretion here. *Switzer Bros. Inc.* v. *Chicago Cardboard Co.*, 7 Cir., 1958, 252 F. 2d 407, 412; *Fisher* v. *Hartford Accident & Indemnity Co.*, 7 Cir., 1964, 329 F. 2d 352, 354.

There was no genuine issue of material fact. The stipulation, pleadings, and exhibits support the District Court's findings that "defendant has not breached the agreement or violated any tenable legal right asserted by the Plaintiff." Rule 56, Federal Rules of Civil Procedure; *Egan* v. *City of Aurora*, 7 Cir., 1960, 275 F. 2d 377, 379; *Parmalee Transport Co.* v. *Keeshin*, 7 Cir., 1961, 292 F. 2d 794, 797.

We have carefully considered all of plaintiff's arguments, but believe it unnecessary to comment on each in detail. We find them lacking in merit. The District Court's judgment is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60610

Wednesday, July 7, 1965

Before
Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

AUTOMATION DEVICES, INC.,
Plaintiff-Appellant,
vs.
EDWARD A. SMALENBERGER, JR., et al.,
Defendants-Appellees.

No. 14832

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

PETITION FOR REHEARING ALLOWED MAY 20, 1965

Dissenting opinion of Justice Underwood filed upon denial of petition for rehearing May 19, 1965 (Justice Schaefer joins in the dissent).

Docket No. 38849—Agenda 19—January, 1965.

Edward J. Schulenburg, *et al.*, Appellees, v. Signatrol, Inc., *et al.*, Appellants.

Mr. JUSTICE SOLFISBURG delivered the opinion of the court:

This case involves the questions of trade secrets, unfair competition and injunctive relief. Plaintiff E-S Industries, Inc., successor to Time-O-Matic, manufactured and sold certain devices commonly called flashers and used primarily in the sign industry to cause light to flash in such a manner as to animate the sign in various patterns or designs. The individual defendants were all former employees of said plaintiff who left to form their own competing company to manufacture and sell flashers. Plaintiffs filed suit against the defendants charging unfair competition by violation of a trade secret and requesting injunctive relief and damages. The trial court found the issues for the plaintiffs and issued an injunction restraining the defendants from the further manufacture and sale of competing flashers. The question of damages was postponed pending appeal. The Appellate Court affirmed (50 Ill. App. 2d 402), and we granted leave to appeal.

In 1932 the plaintiff Edward J. Schulenburg, Sr., went to work for Sangamo Electric Company at Springfield, Illinois, as head of its flasher and timer division and held that position until 1945 when he purchased all of the assets of the flasher and timer division for the sum of $2,718.61. He moved the operation to Danville, Illinois, under the name of Time-O-Matic Company. Defendant J. W. Sutphin had been an employee of Sangamo and when he returned from military service in 1945 he was

employed by Time-O-Matic. Sutphin continued in the employ of Time-O-Matic to January, 1959 when he and the plaintiff Schulenberg had a disagreement of policy concerning the operation of the company and he resigned. Signatrol, Inc. was organized by defendant Sutphin in March, 1959, to manufacture and sell flashers.

The defendant Bachman had been employed by Time-O-Matic since 1947, designing special equipment and assisting in sales work. Bachman left Time-O-Matic in the middle of March, 1959, after a disagreement with Schulenburg and joined the new corporation with Sutphin. The defendants McNarama and Walker had also been employees of Time-O-Matic for several years, McNamara as purchasing agent and Walker in the engineering department. Both of them asked Sutphin whether they could join his organization and in April, 1959, McNamara left Time-O-Matic and joined Signatrol as its purchasing agent and the following June, Walker also joined Signatrol.

The flashers produced by the plaintiffs are not patented nor is there any contention that the flasher itself or the method of assembling the flasher is a trade secret. Indeed, neither the plaintiffs nor defendants are true manufacturers but actually buy the motors, gears, side plates, switches and other parts which they assemble. Many of these parts are regular catalogue items furnished by suppliers and can be ordered by anyone. For that matter, anyone may legally duplicate the plaintiffs' product and go into business in competition with the plaintiffs in the manufacture and sale of electric flashers. The Supreme Court of the United States has held that no State may, by laws dealing with unfair competition, impose damages or enjoin the copying, manufacturing and sale of an article which is protected by neither a Federal patent nor a copy-right. *Sears, Roebuck & Co.* v. *Stiffel*, 376 U.S. 225, 11 L. ed. 2d 661; *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234, 11 L. ed. 2d 669.

Plaintiffs allege, however, that their manufacturing "know-how" is a trade secret which was imparted in

confidence to defendants while employees and that such secret has been used by them in manufacturing a completing product. Defendants deny utilization by them of any such secret, in fact they deny its very existence. The trial and Appellate courts held that the information, measurements, designs and material specifications contained on plaintiffs' blueprints or drawings and used in the manufacturing process qualified as a trade secret. They further found that defendants copied or memorized the information contained on these blueprints and drew on such knowledge in making up their own blueprints to be used in the manufacture of their product.

The three issues presented by this appeal are (1) Was there a trade secret? (2) Did the defendants violate a trade secret? and (3) Was the injunctive relief appropriate?

The trial and Appellate courts concluded that the manufacturing "know-how" contained on the plaintiffs' blueprints or drawings were trade secrets in view of the fact that they were kept confidential and that plaintiffs considered such a secret and attempted reasonably to keep it so. In this connection, it must be pointed out that the blueprints were customarily submitted to several suppliers by the plaintiffs in order to secure the most favorable bids for the manufacture of parts; no effort was made by the company to keep the information on such plans and blueprints secret; the suppliers were never advised that the plans contained any secret information; they were never requested to keep the information on the plans secret; and the plaintiffs never requested a return of the blueprints and plans from suppliers to whom the were sent. The electrical principle involved is well known and plaintiffs' unpatentable product is for sale and anyone can buy it. Anyone reasonably skilled in the art, could, without difficulty, duplicate plaintiffs' flasher from an examination of the flasher itself and lawfully engage in a competing business.

In order to constitute a trade secret which will be protected by injunction there must be a plan, process,

tool, machine or compound known only to the owner and those employees to whom it is necessary to confide in secret. Therefore, a process commonly known in the trade is not a trade secret entitled to injunctive protection, and matters which are generally known in the trade or readily discernible by those in the trade cannot be made secret by being so labeled. (*Victor Chemical Works* v. *Iliff*, 299 Ill. 532; *Sarkes Tarzain, Inc.* v. *Audio Devices, Inc.*, 166 F. Supp. 250, 265 (D. Cal. 1958), aff'd 283 F. 2d 695 (9th cir. 1960), *cert.* denied 365 U.S. 869, 5 L. ed. 2d 859.) Here there is ample evidence in the record to show that the information conveyed to defendants was of such a nature that it was generally known in the trade. In addition, none of the employees were ever told that the plans were secret or confidential, no secrecy agreement was ever required of any employee and no employee was required to enter into any restrictive covenant not to engage in any competitive business with plaintiff.

The Restatement of Torts contains a comprehensive treatment of the principles concerning liability for disclosure or use of others' trade secrets. In section 757 of the Restatement of Torts under comment b it is stated as follows:

"*Definition of a trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

* * *

"*Secrecy.* The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret."

Defendants are accused of copying or memorizing necessary information and using it in their manufacturing process in competition with their former employers. The

Appellate Court quoted, with approval, the memorandum opinion of the trial court which states: "By defendants' own statement they carried away from plaintiffs mental pictures of the plaintiffs' drawings, and specifications, and from that mental picture they reproduced it upon paper—an accurate copy of the original. It was no more or less than a copy made from the original. * * * The human eye is but a photographic lens, and the mind is the film. Through the lens the object is exposed to the sensitive film, the mind. * * * These mental pictures were obtained while in plaintiffs' employment, and to carry them away in this manner was a violation of a confidence reposed in them by their employer, as if they had made copies or photographs and carried them away."

The law is well settled that an employee, upon terminating his employment, may carry away and use the general skill or knowledge acquired during the course of the employment. "[E]quity has no power to compel a man who changes employers to wipe clean the slate of his memory." (*American Cleaners and Dyers* v. *Foreman,* 252 Ill. App. 122; *Peerless Pattern Co.* v. *Pictorial Review Co.,* 147 App. Div. 715, 132 N.Y.S. 37, 39.) In *American Cleaners and Dyers* v. *Foreman,* 252 Ill. App. 122, the court reversed an injunction against defendants who were former route drivers for a laundry and dry cleaning firm who went to work for a competing laundry and solicited their old customers whose names and addresses they had remembered.

A 1958 federal case, *Sarkes Tarzain, Inc.* v. *Audio Devices,* 166 F. Supp. 250, contains an excellent statement of the information which an employee has the right to carry away and use in competition with his former employer:

"Of necessity, whenever a change of employment of this type occurs and former employees enter into the employ of another with whom they engage in a competitive business, it is inevitable that some of the knowledge acquired while in the employ of the other should be made

available to the new employer. But, as already appears, the courts will not deprive the employee of the right to use the skill he developed through the years.

• • •

"So there is agreement among the courts that, except, where real trade secrets are involved, an employee may compete with his former employer and with such knowledge and skill as he has developed in the former's employ."

The only permissible restriction affording injunctive relief in this case is the unlawful violation of a definite trade secret. The plaintiff's blueprinted "know-how" does not qualify under the circumstances as a trade secret. Therefore the defendants could not have been guilty of unfair competition, for the plaintiff's claim of trade secret does not meet the qualifications of the law.

Since we have held that defendants are not guilty of wrongfully using a trade secret, we need not pass upon the scope of the injunction. However, we feel it fitting to note that the injunction granted is unlimited either as to time or geographic area. It amounts to a perpetual injunction from engaging in the electric flasher business and affords more relief than even a patent or restrictive covenant could have afforded under the law. Such an injunction even in an appropriate case would be far too broad.

For the reasons stated, the judgment of the Appellate Court is reversed, and the cause is remanded to the trial court, with directions to dismiss the complaint.

Reversed and remanded, with directions.

Mr. Justice Underwood, dissenting:

That the dimensions, tolerances, positions and relationships, metallurgical qualities and other specifications of plaintiffs' products contained in various blueprints, plans and drawings do not constitute trade secrets and are not entitled to protection as such is a holding with which I cannot agree.

The controlling definition of a trade secret in Illinois is supplied by *Victor Chemical Works* v. *Iliff*, 299 Ill. 532, 540, where this court said that it is "[A] secret *plan* or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it." (Emphasis added.) The initial requirement that the plan, tool, *etc.*, be regarded as a secret has been found to exist by both the trial and appellate courts herein. There is ample evidence in the record to support these findings, and they should not be disturbed here. Hence, the only question presented to this court is whether, notwithstanding the fact that the parties treated the information contained in the blueprints as containing confidential material, it nevertheless does not amount to a trade secret.

In *Smith* v. *Dravo Corp.*, 203 F. 2d 369, 7th cir. 1953, decided under the law of Pennsylvania and relied upon by both the trial and appellate courts herein, it was held that information contained in blueprints and patterns did qualify as a trade secret, even though the finished product was on the market (and could, as plaintiffs concede here, be copied by legal means), and literature had been distributed to the industry partially disclosing the product's design. The reasoning of that opinion is, in my judgment, most persuasive here.

The majority cite *Sears, Roebuck & Co.* v. *Stiffel*, 376 U.S. 225, 11 L. ed. 2d 661, 84 S. Ct. 784, and *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234, 11 L. ed. 669, 84 S. Ct. 779, for the proposition "that no state may, by laws dealing with unfair competition, impose damages or enjoin the copying, manufacturing and sale of an article which is protected by neither a Federal patent nor a copyright." In a proper case, I would have no trouble with this statement. However, reading of *Sears* and *Compco* clearly indicates that they are inapposite here. There, the defendants had copied the plaintiffs' unpatentable products by legal means. No problem concerning trade secrets was present. Plaintiffs here readily concede that their finished products may be copied by

legal means, (such as acquiring one of the finished products and measuring and analyzing it, until a copy can be produced), but maintain that employees in positions of confidence may not surreptitiously copy plaintiffs' blueprints while in their employ and subsequently use them to establish a competing business. *Sears* has in fact been distinguished on this very basis, in *Servo Corporation of America* v. *General Electric Co.* (4th cir., 1964), 337 F. 2d 716. It was there held that one could not take advantage of a confidential relationship and pirate another's trade secrets without responding in damages—even though the finished product was unpatentable and could be copied by legal means.

A holding that the confidential information contained in these blueprints does not constitute a trade secret is, I believe, incompatible with the practical problems inherent in attempting to copy a product from examination of the product itself. The measurements, tolerances, quality of material, *etc.*, cannot ordinarily be discovered by these means without expensive and time-consuming analyses. Plaintiffs have gone through this process by trial and error and have preserved the information thus acquired in working drawings and blueprints. Defendants, however, have chosen to capitalize upon their positions of trust—to clandestinely acquire the blueprints and reproduce them exactly. (There is evidence in the record indicating that when some of defendant's drawings are superimposed over plaintiffs' corresponding ones, they match exactly—even to the positioning of the lettering thereon. Better evidence of copying would be hard to obtain. In fact, defendants have even copied some of the plaintiffs' mistakes.)

It is clear that an employee may take with him, at the termination of his employment, general skills and knowledge acquired during his tenure with the former employer. It is equally clear that the same employee may not take with him confidential particularized plans or processes developed by his employer and disclosed to him while the employer-employee relationship exists, which

are unknown to others in the industry and which give the employer advantage over his competitors. The facts and circumstances in a particular case sometimes necessitate the drawing of a fine line of distinction in determining which rule should properly apply. Suffice it to say here that, in my judgment, the facts and circumstances indicated herein fall well within the contemplation of the latter rule.

It should, moreover, make no difference whether the information contained in the blueprints, if it qualifies as a trade secret (which in my judgment it does), has been pilfered by tracing the blueprints themselves (as some testimony herein indicates or has been memorized by someone with a photographic memory, or has been committed to memory by constant exposure to the prints while in the employ of plaintiffs. This record is replete with evidence leading to but one conclusion, *i.e.*, that these defendants have surreptitiously taken the particularized information contained in plaintiff's blueprints and have employed it to establish a competing business. Even today's "morals of the market place" are more demanding than this, and should not be relaxed by this court, I would affirm the judgments of the trial and appellate courts on the trade secret question.

The bothersome aspect of the trial and appellate court decisions is the scope of the injunction that has been issued. It does not restrict its application as to time or geographical area. Defendants have, in effect, been put out of business for all time, everywhere. This is clearly not necessary to make plaintiffs whole as it is conceded by them that their products may legally be copied by competitors. Since defendants might have reproduced plainiffs' flasher in this fashion, it is difficult to justify prohibition of such reproduction for a period of time longer than that required to duplicate the product by lawful means. The record contains no indication of the time so required, but such fact should be readily ascertainable since a Minnesota firm did legally copy plaintiffs' product. I would accordingly deem it appropriate to modify the injunction so as to limit its duration to the

period of time reasonably required for plaintiffs to legally produce such copies, and remand the cause for a determination thereof, as well as the question of damages reserved by the trial court for future consideration. If the evidence established that the period of time required for reproduction of the flasher by lawful means, computed from the date defendants first commenced production, has now expired, the injunction order should be vacated.

I would, therefore, affirm the trial and appellate courts' determinations on the trade secret issue and remand for a consideration of the questions as to damages and modification of the injunction.

Mr. Justice Schaefer joins in this dissent.

Docket No. 38849—Agenda 28—May, 1965.

Edward J. Schulenburg, *et al.*, Appellees, v. Signatrol, Inc., *et al.*, Appellants.

Mr. Justice Solfisburg delivered the opinion of the court:

This case involves the questions of trade secrets, unfair competition and injunctive relief. Plaintiff E-S Industries, Inc., successor to Time-O-Matic, manufactured and sold certain devices commonly called flashers and used primarily in the sign industry to cause lights to flash in such a manner as to animate the sign in various patterns or designs. The individual defendants were all former employees of said plaintiff who left to form their own competing company to manufacture and sell flashers. Plaintiffs filed suit against the defendants charging unfair competition by violation of a trade secret and requesting injunctive relief and damages. The trial court found the issues for the plaintiffs and issued an injunction restraining the defendants from the further manufacture and sale of competing flashers. The question of damages was postponed pending appeal. The appellate court affirmed (50 Ill. App. 2d 402), and we granted leave to appeal.

In 1932 the plaintiff Edward J. Schulenburg, Sr., went to work for Sangamo Electric Company at Springfield, Illinois, as head of its flasher and timer division and held that position until 1945 when he purchased all of the assets of the flasher and timer division for the sum of $2,718.61. However, this amount is unimportant for since that time many blueprints, plans, specifications and drawings have been revised or added over the years by the plaintiff to perfect the flasher. In fact, there now are approximately 15,000 drawings of various types. He moved the operation to Danville, Illinois, under the name of Time-O-Matic Company. Defendant J. W. Sutphin had been an employee of Sangamo and when he returned from military service in 1945 he was employed by Time-O-Matic until January, 1959, when he and the plaintiff

Schulenburg had a disagreement of policy concerning the operation of the company and he resigned. Signatrol, Inc. was organized by defendant Sutphin in March, 1959, to manufacture and sell flashers.

The defendant Bachman had been employed by Time-O-Matic since 1947, designing special equipment and assisting in sales work. Bachman left Time-O-Matic in the middle of March, 1959, after a disagreement with Schulenburg and joined the new corporation with Sutphin. The defendants McNamara and Walker had also been employees of Time-O-Matic for several years, McNamara as purchasing agent and Walker in the engineering department. Both of them asked Sutphin whether they could join his organization and in April, 1959, McNamara left Time-O-Matic and joined Signatrol as its purchasing agent and the following June, Walker also joined Signatrol.

The flashers produced by the plaintiffs are not patented nor is there any contention that the flasher itself or the method of assembling the flasher is a trade secret. Indeed, neither the plaintiffs nor defendants are true manufacturers, but actually buy the motors, gears, side plates, switches and other parts which they assemble. Many of these parts are regular catalogue items furnished by suppliers and can be ordered by anyone. For that matter, anyone may legally duplicate the plaintiffs' product and go into business in competition with the plaintiffs in the manufacture and sale of electric flashers.

Plaintiffs allege, however, that their manufacturing "know-how" is a trade secret which was imparted in confidence to defendants while employees and that such secret has been used by them in manufacturing a competing product. Defendants deny utilization by them of any such secret, in fact they deny its very existence. The trial and appellate courts held that the information, measurements, designs and material specifications contained on plaintiffs' blueprints or drawings and used in the manufacturing process qualified as a trade secret. They further found that defendants copied or memorized

the information contained on these blueprints and drew on such knowledge in making up their own blueprints to be used in the manufacture of their product.

The trial judge in his memorandum opinion stated the issues involved in the following language:

"Signatrol, Inc. was organized by the foregoing defendants in March 1959, and by the latter part of June, 1959, were (sic) engaged in the production of electric flashers. Their product was to serve the same purpose as plaintiff's (sic) product, and was very similar to the product of the plaintiffs. However, similarity of products is not the controlling test which is determinative of the issues in this case, but is a factor to be considered. The question of infringement of patents is not involved. The real question is whether or not the individual defendants, or some of them, either traced, copied or reproduced Time-O-Matic plans, drawings, prints, designs, or carried away in their minds information as to the same so that they could reproduce them from their memory, provided further that such information was such as would be classed as a 'trade secret'." The determinative question here is, how did the defendants go about reproducing the plaintiffs' flasher? Did they violate the confidence reposed by their employer by appropriating, in an unlawful manner, the trade secrets of the plaintiffs?

The trial judge has correctly stated the issues involved, and, of course, there is another issue in this appeal, and that is whether the injunctive relief granted was appropriate.

The trial and the appellate courts concluded that the manufacturing "know-how" contained in the plaintiffs' blueprints and drawings were trade secrets in view of the fact that they were kept confidential and that plaintiffs considered such as secret and attempted reasonably to keep it so. The memorandum opinion of the trial judge is forty pages in length, contains a detailed analysis of the evidence, makes certain findings hereinafter mentioned, and contains a very competent analysis of most

of the cases in the United States concerning trade secrets and the method whereby the use of such trade secrets is acquired either legally or illegally. The abstract of evidence is 240 pages in length, and it would unduly extend this opinion to review in detail all the evidence. Several of the more salient findings of the trial court are:

"The Defendants insist that they made their drawings directly from the parts themselves by measuring, except when they drew them from their memory of Time-O-Matic's drawings. However, their expert witness, Dale Beck, a skilled engineer, looked with considerable askance (sic) upon the ability of any engineer to make accurate drawings of many of the delicate parts merely by measurements of the parts. This was particularly true as to those parts where the measurements were to a 10/1000 of an inch. And to come up with the identical measurement, tolerances, etc., as appear upon Time-O-Matic drawings were (sic) almost impossible."

"There is a marked similarity between the drawings and sketches of Signatrol and those of Time-O-Matic, in other respects. The data is too often too alike to be just accidental. The placement of the data on the drawing is almost universally the same."

"The likenesses and similarities occur so often, with such exactness, that it seems most unlikely that they should so occur, if, as claimed by defendants all their drawings were made from the torn down flasher parts, and without reference to any drawings or sketches or specifications of Time-O-Matic."

"It is to be observed that at no time did the Defendants seek to produce a new and improved flasher. They advanced no 'new novel' improvements. They only sought to reproduce the identical basic flasher of the Plaintiffs."

"From the character of the Defendants' own evidence, their admissions, the very nature of their procedure in entering into this competing business, their evasive attitude, one cannot but conclude that here was a carefully designed scheme and plan to reproduce from their

employer's trade secrets, the product of their employer. This conclusion is emphasized by Sutphin's testimony that he anticipated he would be sued. He had sought the advice of an attorney, then anticipating a suit he preserved a large number of his sketches. Why would he anticipate being sued, if he only intended to copy the product from the product itself, and did not intend to resort to the use of his employer's trade secrets?"

"After hearing all the evidence, and having observed the Defendants as witnesses, and their manner of testifying, this Court is convinced that this was a well planned scheme upon the part of the Defendants. This Court believes that the very nature of all the occurrences confirms the testimony of Mrs. Bachman relative to copying Plaintiffs' plans, drawings and specifications in Bachman's home. This Court also believes that, just as the Defendants admit, they had over the years actually memorized Plaintiffs' plans and drawings, and the information upon them; that they actually had a mental picture of these trade secrets, which was no different than having a copy or picture on paper. These mental pictures were obtained while in Plaintiffs' employment, and to carry them away in this manner was a violation of a confidence reposed in them by their employer, as if they had made copies or photographs and carried them away. This was not using the skill they had obtained, it was a question of copying and carrying away the actual trade secrets of Plaintiffs."

The trial judge also stated "it is of the very essence of things to see to it that the stringent and clamorous voice of self interest does not drown out the still, small voice of duty and conscience."

After having considered the entire record in the trial court, including the transcript of the evidence, and the trial judge's opinion, we have determined, as did the appellate court, that the evidence supported the findings of the trial court.

The controlling definition of a trade secret in Illinois is supplied by *Victor Chemical Works* v. *Iliff*, 299 Ill. 532, 540, where this court said that it is a secret *plan* or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. The initial requirement that the plan, tool, *etc.*, be regarded as a secret has been found to exist by both the trial and appellate courts herein. There is ample evidence in the record to support these findings, and they should not be disturbed here. The more difficult question presented to this court is whether, notwithstanding the fact that the parties treated the information contained in the blueprints as containing confidential material, it nevertheless does not amount to a trade secret.

In *Smith* v. *Dravo Corp.*, 203 F.2d 369, 7th cir. 1953, decided under the law of Pennsylvania and relied upon by both the trial and appellate courts herein, it was held that information contained in blueprints and patterns did qualify as a trade secret, even though the finished product was on the market (and could, as plaintiffs concede here, be copied by legal means), and literature had been distributed to the industry partially disclosing the product's design. The reasoning of that opinion is most persuasive here.

The defendants cite *Sears, Roebuck & Co.* v. *Stiffel*, 376 U.S. 225, 11 L. ed. 2d 661, 84 S. Ct. 784, and *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234, 11 L. ed. 2d 669, 84 S. Ct. 779, for the proposition "that no state may, by laws dealing with unfair competition, impose damages or enjoin the copying, manufacturing and sale of an article which is protected by neither a Federal patent nor a copyright." In a proper case, we would concur with this statement. However, a reading of *Sears* and *Compco* clearly indicates that they are inapposite here. There, the defendants had copied the plaintiffs' unpatentable products by legal means. No problem concerning trade secrets was present. Plaintiffs here readily concede that their finished products may be copied by legal means (such as acquiring one of the finished prod-

ucts and measuring and analyzing it, until a copy can be produced), but maintain that employees in positions of confidence may not surreptitiously copy plaintiffs' blueprints while in their employ and subsequently use them to establish a competing business. *Sears* has in fact been distinguished on this very basis, in *Servo Corporation of America* v. *General Electric Co.*, (4th cir., 1964,) 337 F. 2d 716. It was there held that one could not take advantage of a confidential relationship and pirate another's trade secrets without responding in damages—even though the finished product was unpatentable and could be copied by legal means. It is readily apparent that the *Sears* and *Compco* cases do not cover a situation of industrial espionage by employees who plan to organize a competing company and thereafter do that very thing.

A holding that the confidential information contained in the blueprints does not constitute a trade secret would be incompatible with the practical problems inherent in attempting to copy a product from examination of the product itself. The measurements, tolerances, quality of material, *etc.*, cannot ordinarily be discovered by these means without expensive and time-consuming analyses. Plaintiffs have gone through this process by trial and error and have preserved the information thus acquired in working drawings and blueprints. Defendants, however, have chosen to capitalize upon their positions of trust —to clandestinely acquire the blueprints and reproduce them exactly. There is evidence in the record indicating that when some of defendant's drawings are superimposed over plaintiffs' corresponding ones, they match exactly—even to the lettering thereon. Better evidence of copying would be hard to obtain. In fact, defendants have even copied some of plaintiffs' mistakes.

It is clear that an employee may take with him, at the termination of his employment, general skills and knowledge acquired during his tenure with the former employer. It is equally clear that the same employee may not take with him confidential particularized plans or processes developed by his employer and disclosed to him

while the employer-employee relationship exists, which are unknown to others in the industry and which give the employer advantage over his competitors. The facts and circumstances in a particular case sometimes necessitate the drawing of a fine line of distinction in determining wich rule should properly apply. Suffice it to say that the facts and circumstances indicated herein fall well within the contemplation of the latter rule.

It should, moreover, make no difference whether the information contained in the blueprints, if it qualified as a trade secret (which in our judgment it does), has been pilfered by tracing the blueprints themselves, as some testimony herein indicates, or has been memorized by someone with a photographic memory, or has been committed to memory by constant exposure to the prints while in the employ of plaintiffs. This record is replete with evidence leading to but one conclusion: that these defendants have surreptitiously taken the particularized information contained in plaintiffs' blueprints and have employed it to establish a competing business. Even today's "morals of the market place" are more demanding than this, and should not be relaxed by this court. The determinations of the trial and appellate courts on the trade secret question are affirmed.

The bothersome aspect of the trial and appellate court decisions is the scope of the injunction that has been issued. It does not restrict its application as to time or geographical area. Defendants have, in effect, been put out of business for all time, everywhere. This clearly is not necessary to make plaintiffs whole as it is conceded by them that their products may legally be copied by competitors. Since defendants might have reproduced plaintiffs' flasher in this fashion, it is difficult to justify prohibition of such reproduction for a period of time longer than that required to duplicate the product by lawful means. The record contains no indication of the time so required, but such fact should be readily ascertainable since a Minnesota firm apparently did legally copy plaintiffs' product. Accordingly, we deem it appro-

priate to modify the injunction so as to limit its duration to the period of time reasonably required for defendants to legally produce such copies, and remand the cause for a determination thereof, as well as to consider the question of damages reserved by the trial court for future consideration. If the evidence establishes that the period of time required for reproduction of the flasher by lawful means, computed from the date defendants first commenced production, has now expired, the injunction order should be vacated.

The trial and appellate court determinations on the trade secret issue are affirmed and the cause is remanded to the trial court with instructions to consider the question of damages and modification of the injunction in accordance with the views expressed herein.

Affirmed in part and reversed in part and remanded, with directions.